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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GERALD ROGERS,

Plaintiff and Appellant,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Respondent.

F062097

(Super. Ct. No. S-1500-CV-271476)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Linda S. Etienne, Commissioner.

Law Offices of Richard O. Middlebrook, Middlebrook & Brehmer, Richard O. Middlebrook and Jeremy C. Brehmer for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Jerald L. Mosley and Mark Schreiber, Deputy Attorneys General, for Defendant and Respondent.

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Respondent, Department of Motor Vehicles (DMV), revoked the driver's license issued to appellant, Gerald Rogers, following administrative review under Vehicle Code[1] section 13953. The DMV concluded that appellant's chronic and excessive use of alcohol caused him to be a danger to the motoring public.

Appellant filed a petition for writ of mandate in the trial court. Based on its independent review of the administrative record, the trial court affirmed the DMV's decision and denied appellant's petition.

Appellant challenges the trial court's decision. According to appellant, the DMV failed to establish an ongoing nexus between his alleged drinking problem and driving.

Contrary to appellant's position, substantial evidence supports the trial court's decision. Therefore, the judgment will be affirmed.

BACKGROUND

Appellant has been arrested for driving under the influence of alcohol four times since 1999. He was first arrested on July 24, 1999, with a blood alcohol level of .21 percent. This arrest resulted in a conviction and appellant's license was suspended.

On October 30, 2005, appellant was again arrested for driving under the influence of alcohol with a blood alcohol level of .22 and .23 percent. However, a jury acquitted appellant of the criminal charges and his driver's license suspension was set aside.

A third arrest for driving under the influence of alcohol on February 8, 2007, resulted in appellant's license being suspended and revoked under section 13953 due to chronic alcohol abuse. Appellant's blood alcohol level was .23 percent. Appellant's license was reinstated on July 22, 2009.

Appellant's fourth arrest occurred on May 17, 2010. California Highway Patrol Officer B. Townsend observed appellant sitting in a vehicle. The vehicle caught

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[1] All further statutory references are to the Vehicle Code unless otherwise noted.

Townsend's attention because it had been recently described to him as a vehicle owned and operated by a person who frequently consumed alcohol. Moreover, earlier that day, a citizen told Townsend of his concern that appellant frequently drove under the influence of alcohol.

Appellant started driving and Townsend followed him. Townsend observed appellant stop and get out of his vehicle. Appellant then began playing with his dog. Townsend approached appellant and noticed that appellant's speech was slurred when he talked to his dog. Townsend could smell alcohol on appellant's breath and noted that his eyes were red and watery and his gait was unsteady. Appellant failed to perform field sobriety tests satisfactorily and Townsend placed appellant under arrest. Appellant was arrested for driving under the influence of alcohol. His blood alcohol level was .21 and .22 percent. There is nothing in the record to indicate whether appellant was criminally prosecuted or not.

Appellant's driver's license was suspended under section 13353.2. However, after an administrative hearing, the suspension was set aside by the DMV. The hearing officer concluded that Townsend did not have probable cause to contact appellant.

In August 2010, pursuant to section 13953, the DMV sent appellant a letter revoking his license due to "excessive and chronic use" of alcohol. Appellant requested an administrative hearing.

At the hearing, appellant's driving record and a driver medical evaluation report were introduced. The medical evaluation, dated June 28, 2010, stated that appellant had been alcohol free for two and one-half years.

When questioned by the DMV hearing officer, appellant testified that May 17, 2010, was the only time he drank in the last three years, and that he did not drink and drive. Appellant further stated that on that date, although he was at or near a vehicle, he did not drive. Rather, he did not start to drink until he was out in the field with his dog

and that "there was a lady coming to pick [him] up." Appellant admitted that he slips up once in a while but was adamant that May 17 was the only time since 2007.

Regarding his history, appellant stated that alcohol became a problem for him in 1999 and that, in the past, he would drink "a [p]int" of vodka a day. Appellant attended one rehabilitation program in 2004 or 2005 for 15 days but resumed drinking thereafter. Appellant testified that he goes to Alcoholics Anonymous (AA) meetings occasionally at locations approximately 100 miles away from his home. He stated that he does not like the format of the AA meetings in the city where he lives and that he does not have an AA sponsor.

In his defense, appellant introduced letters from two of his neighbors, Patricia Keenum and Russell Kennedy. Keenum stated that she had arranged with appellant to pick him up from the field and that, when she arrived at 2:15 p.m., appellant was being questioned by a California Highway Patrol officer. Kennedy wrote that he was talking with appellant across the fence about one-half hour before appellant was arrested and, at that time, appellant showed no signs of being under the influence.

The hearing officer found that appellant's testimony was "poor and unbelievable." He observed that appellant had no remorse for his actions, was in denial, and did not accept that alcohol poses a risk to the motoring public. The hearing officer further noted that appellant had not submitted any evidence to support his testimony that he is on the way back to recovery. The hearing officer summarized appellant's testimony as "manipulative, cunning, and untruthful."

Based on these findings, the hearing officer concluded that appellant's ability to operate a motor vehicle safely is affected because of excessive and chronic use of alcohol and that appellant is a danger to the motoring public by drinking and driving. He found it more likely than not that appellant would continue to drink and drive as prior sanctions had not caused appellant to stop drinking and driving. Therefore, the hearing officer revoked appellant's driving privilege in the name of traffic safety.

Appellant filed a petition for writ of mandate in the trial court. Following a hearing, the trial court denied the petition. Upon reviewing the record and considering counsel's arguments, the court agreed completely with the DMV hearing officer that appellant's testimony was "insincere, not credible and dishonest." The court believed nothing appellant said except his admission that alcohol is a problem for him and that he continues to consume alcohol. Noting that the only available indicator of appellant's future conduct is his past behavior, the court concluded that the evidence was sufficient for the DMV to exercise its discretion and revoke appellant's license. The court found that appellant has "obviously" continued to consume alcohol and "obviously" continued to drive a motor vehicle and that "[t]he evidence that he engages in the two activities in that order and nearly contemporaneously are his prior convictions for driving under the influence, and his admission to the officer on May 17, 2010, that he had been drinking prior to driving."

DISCUSSION

Section 13953 provides that the DMV shall suspend or revoke a person's driver's license if it determines, upon investigation or reexamination, that the safety of the person or the safety of other persons on the highways so requires. These provisions authorizing such administrative review are discretionary and any action taken against the licensee is not penal in nature. Rather, "[t]he purpose underlying these provisions is to make the streets and highways safe by protecting the public from drivers who have demonstrated incompetence, lack of care, or willful disregard of the rights of others." (*Johnson v. Department of Motor Vehicles* (1990) 222 Cal.App.3d 695, 699 (*Johnson*).) During such investigation or reexamination, there is more at issue than the triggering event. The licensee's prior traffic record, including license suspensions, revocations or restrictions, traffic violation convictions, mental and physical condition, knowledge of and compliance with the vehicle laws, and ability to exercise ordinary and reasonable care in operating a motor vehicle are all subject to review. (*Id*. at p. 700.)

On review of the DMV's decision to revoke or suspend a license, the trial court exercises its independent judgment. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 398.) However, the appellate court must sustain the trial court's findings if substantial evidence supports them. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320-321 (*Mann*).)

As noted by appellant, to support the revocation of his license, the DMV was required to find a nexus between appellant's use of alcohol and driving. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770.) In its independent review of the administrative record, the trial court concluded that such a nexus existed. The court examined the evidence and found that there was "a basis for determining that [appellant's] use of alcohol will imperil the safety of [appellant] or other persons upon the highways, to-wit, that he is likely to drive after consuming alcohol."

Appellant contends that the DMV and the superior court failed to demonstrate an ongoing nexus between appellant's drinking and driving because each substituted real evidence with its own speculation. According to appellant, the DMV and trial court ignored evidence, i.e., the evidence submitted by the medical professional and appellant's neighbors, and made unexplained sweeping credibility determinations.

Contrary to appellant's position, the record does not indicate that evidence was ignored. Moreover, we must presume that the trial court reviewed all of the evidence in the case and exercised its independent judgment. (*Mann, supra*, 76 Cal.App.4th at p. 322.)

In any event, appellant's evidence was, at most, inconclusive. It merely created conflicts in the record. Although the medical evaluation stated that appellant had been alcohol free for two and one-half years, appellant admitted that he had consumed alcohol at least once during that period. Further, the gist of the letters from appellant's neighbors was that on May 17, 2010, appellant did not drink before he drove. However, Officer Townsend observed appellant drive shortly before a preliminary test indicated a blood

alcohol content above the legal limit. On appeal, we must resolve all such evidentiary conflicts in favor of the trial court's decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.)

Appellant's complaint that the DMV and trial court made "sweeping credibility determinations" is also unavailing. In fact, appellant admits that he "arguably had questionable credibility." It is not this court's task to weigh conflicts and disputes in the evidence. Rather, we are bound by the trial court's factual determination that appellant's testimony was "insincere, not credible and dishonest." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

Additionally, appellant argues that the DMV and the trial court could not rely on the May 17, 2010 incident. Appellant contends that, because the DMV determined that Townsend did not have probable cause to contact appellant, the evidence should have been excluded from this administrative hearing.

However, criminal court proceedings and administrative proceedings that are civil in nature, such as a section 13953 license revocation proceeding, are intended to operate independently of each other and to provide for different dispositions. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 847.) Technical rules of evidence do not apply to such administrative hearings. Rather, pursuant to Government Code section 11513, subdivision (c), any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (*Gikas v. Zolin*, *supra*, 6 Cal.4th at pp. 858-859.) Thus, the exclusionary rule does not apply to all administrative hearings and, in fact, has never been applied outside the criminal context. (*Id*. at pp. 857, 859.)

This proceeding was not penal in nature, but rather, was to remove an unsafe driver from the highways. (*Johnson*, *supra*, 222 Cal.App.3d at p. 700.) Thus, appellant's entire prior traffic record, as well as his mental and physical condition and ability to exercise ordinary and reasonable care in operating a motor vehicle, was subject to examination and review. (*Ibid*.) Under these circumstances, the exclusionary rule was

inapplicable. The May 17 evidence was relevant to appellant's ability to exercise ordinary and reasonable care in operating a motor vehicle and therefore was admissible.

In sum, substantial evidence supports the trial court's findings that there was a nexus between appellant's drinking and driving and that the DMV properly exercised its discretion to revoke appellant's driver's license.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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LEVY, Acting P.J.

WE CONCUR:

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GOMES, J.

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DETJEN, J.